ORIENTAL BANK BHD

v.

CIPTA PERMAI SDN BHD

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-873-2000]
22 SEPTEMBER 2003

LAND LAW: *Charge - Order for sale of charged land - Application for - Resistance by chargor - Failure to meet conditions for making of an application - Allegation of - Validity of notices of demand and Form 16D questioned - Allegation of excessive amount claimed - Whether incorrect amount relevant - Whether chargee need to prove amount owed by chargor - Principles in Siong Holdings Sdn Bhd v. Development & Commercial Bank Bhd and Kandiah Peter v. Public Bank Bhd - National Land Code, s. 256*

LAND LAW: *Charge - Order for sale of charged land - Application for - Registered charge - Whether particulars of respective charges duly entered, signed and certified by the Registrar of Titles - Whether complied with O. 83 r. 3(2) of the Rules of the High Court 1980*

LAND LAW: *Charge - Order for sale of charged land - Application for - Resistance by chargor - Whether "cause to the contrary" established - National Land Code, s. 256(3)*

This was the plaintiff's application for an order for sale of a certain land ('the land') pursuant to s. 256 of the National Land Code (NLC) and O. 83 of the Rules of the High Court 1980 (RHC). The facts were that the defendant had charged the said land in favour of the plaintiff to secure a term loan facility of RM540,000 and an overdraft facility of RM400,000 granted by the plaintiff to the defendant. In breach of the covenant under the charges, the defendant defaulted in the repayment of the monthly instalments under the term loan facility and exceeded the overdraft limit under the overdraft facility. Two notices of demand were served on the defendant, but the plaintiff received no repayment. Subsequently, by a statutory notice in Form 16D duly served on the defendant, the plaintiff called upon the defendant to remedy the breach within one month, which the latter failed to do. Hence, this application.

The defendant contended that the plaintiff had failed to meet the conditions for the making of an application for an order for sale as Form 16D and the notices of demand are invalid because the plaintiff had claimed a rate of interest not pursuant to the rate fixed in the charge ie an excessive amount and an excessive rate of interest. Further, the defendant submitted that the plaintiff had failed to comply with O. 83 r.3(2) of the RHC in that the charge certificate was not produced at the hearing of the summons as the court must be satisfied that the charge has been registered before it can exercise the jurisdiction to make an order for sale under s. 256 of the NLC.

Held:

[1] Following the principle laid down in *Siong Holdings Sdn Bhd v. Development & Commercial Bank Bhd* and *Kandiah Peter v. Public Bank Bhd*, the chargee need not prove the amount owed by the chargor. All the chargee had to show in order to obtain an order for sale in foreclosure was the inability of the chargor to settle the loan. Likewise, the alleged incorrect amount was irrelevant. Further, the defendant's affidavit did not appear to dispute the content of Form 16D. It is trite law that in the circumstances, the content of Form 16D including the amount stated therein must be taken to have been admitted by the defendant. There was no substance in the defendant's contention pertaining to the invalidity of the notices of demand and Form 16D. (pp 477 d-h & 478 a)

[2] Since the charges in question are registered charges, O. 83 r. 3(2) RHC requires a charge certificate to be produced at the hearing of the summons. It was the court's view that the word "produced" here is satisfied if the plaintiff's affidavit exhibits a charge in Form 16A containing all the particulars of the charge which have been duly entered thereon by the registrar of titles who has affixed his signature to the charge and certified it as such. Such certification by the registrar of titles would constitute a charge certificate. Upon a proper perusal of the charge documents herein, the particulars of the respective charges have been duly entered, signed and certified by the registrar of titles and hence, the production of a charge certificate under O. 83 r. 3(2) was satisfied. (p 478 c-e)

[3] In an application for an order for sale in a charge action, the court must make an order for sale to which the charge relates unless it is satisfied that a chargor can raise issues to show "cause to the contrary" in proceedings brought by the chargee under s. 256(3) of NLC. However, the defendant had failed to establish that the plaintiff had not met the conditions precedent for the making of an application for an order for sale. (p 480 d-h)

[Application allowed.]

Case(s) referred to:

Alliance Bank Malaysia Bhd v. CKS Trading Sdn Bhd [2002] 4 CLJ 620 HC ***(refd)***

Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC ***(refd)***

Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan [2002] 3 CLJ 686 HC ***(refd)***

Citibank NA v. Ibrahim Othman [1994] 1 MLJ 608 HC ***(dist)***

Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467 HC ***(dist)***

Dawkins v. Prince Edward of Saxe Weimar [1875-76] 1 QBD 499 ***(refd)***

Feedmeal Malaysia Sdn Bhd v. Teh Cho Yeow & Ors [2003] 7 CLJ 11 HC ***(refd)***

Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 SC ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***

Mokhtar Amin v. Mohamed Moktar Omar [2001] 4 CLJ 489 CA ***(refd)***

Multi-Purpose Bank Bhd v. Maimoon Abdul Razak [1999] 3 CLJ 21 HC ***(dist)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC ***(refd)***

PhileoAllied Bank (M) Bhd v. Saddhona Indran Sevapragasam [1999] 3 CLJ 649 HC ***(dist)***

Siong Holdings Sdn Bhd v. Development & Commercial Bank Bhd [1997] 1 CLJ 590 CA ***(refd)***

Southern Bank Bhd v. Entigma Sdn Bhd [2002] 8 CLJ 961 HC ***(refd)***

Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 FC ***(refd)***

United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2001] 2 CLJ 31 CA ***(refd)***

Legislation referred to:
National Land Code. s. 256(3)
Rules of the High Court 1980, O. 1A, O. 2 r. 3, O. 83 r. 3(2)

For the defendant - Tony Woon Yeow Thong; M/s Woon & Co
For the plaintiff - Kung Oi Fah; M/s Lee Boon Peng & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Application

Before me is encl. (2) which is the plaintiff's application for an order for sale of the land held under HS(D) 89315 PT. No. 9984 in the mukim of Labu ("the land") pursuant to s. 256 of the National Land Code 1965 and O. 83 of the Rules of the High Court 1980.

For brevity, a reference to a section and an order in this judgment shall be a reference to that section in the National Land Code 1965 and to that order in the Rules of the High Court 1980, respectively.

Facts Of The Case

The facts are far from complex and do not appear to be controverted.

The defendant, the registered owner of the land, has charged the land in favour of the plaintiff by way of first and second legal charges, duly registered on 19 March 1996 *vide* presentation No. 4986-96 Jilid 1160 Folio 60 and presentation No. 4987-96 Jilid 1160 Folio 61, respectively to secure a term loan facility of RM540,000 and an overdraft facility of RM400,000 granted by the plaintiff to the defendant at the defendant's request.

The plaintiff has disbursed the said facilities to the defendant.

The term loan facility bore interest at 2% per annum above the plaintiff's prevailing base lending rate on monthly rests as stated in the annexure to the first charge.

The overdraft facility bore interest at 2.5% per annum above the plaintiff's base lending rate on daily rests as stated in the annexure to the second charge.

The plaintiff *vide* letter dated 9 March 1998 gave notice to the defendant regarding the rate of interest with effect from 15 March 1998.

In breach of the covenant under the aforesaid charges, the defendant defaulted in the repayment of the monthly instalments under the term loan facility and exceeded the overdraft limit under the overdraft facility.

The plaintiff's solicitors *vide* letter of demand dated 18 February 2000 demanded arrears of 10 months amounting to RM102,826.43 under the term loan account, and another sum of RM9,485.93 under the overdraft account as at 16 February 2000 together with interest thereon. The defendant failed to comply therewith.

By another letter dated 9 March 2000, the plaintiff's solicitors recalled the said facilities and demanded the total outstanding balance of RM447,505.97 under the term loan account and RM412,511.79 under the overdraft account due as at 5 March 2000 together with interest thereon. The defendant again failed to comply therewith.

By a statutory notice in Form 16D dated 21 June 2000 ("Form 16D") duly served on the defendant, the plaintiff called upon the defendant to remedy the breach within one month. The defendant failed to remedy the breach within the prescribed period.

Hence, the plaintiff's application herein for an order for sale.

The total amount outstanding as at 22 September 2003 is in the sum of RM878,433.15 made up as follows:

(i) RM409,789.45 under the term loan facility; and

(ii) RM468,643.70 under the overdraft facility.

Submission For Defendant

In resisting the plaintiff's application, Encik Tony Woon Yeow Thong, learned counsel for the defendant, submitted that the plaintiff has failed to meet the conditions for the making of an application for an order for sale as Form 16D and the notices demand are invalid by reason of the plaintiff charging double interest for the period from 5 March 2000 to 5 June 2000. He relied on *Multi-Purpose Bank Bhd v. Maimoon bte Abdul Razak* [1999] 3 CLJ 21; *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467 and *PhileoAllied Bank (M)*

Bhd v. Saddhona Indran a/p Sevapragasam [1999] 3 CLJ 649. He added that it would be grossly unfair for an order for sale to be made against the defendant.

Finally, it was contended for the defendant that the plaintiff has failed to comply with O. 83 r. 3(2) in that the charge certificate was not produced at the hearing of the summons, as the court must be satisfied that the charge has been registered before the court can exercise the jurisdiction to make an order for sale under s. 256 of the National Land Code 1965. He cited *Citibank NA v. Ibrahim bin Othman* [1994] 1 MLJ 608 in support.

Response By Plaintiff

Cik Kung Oi Fah, learned counsel for the plaintiff, submitted that the issue of double interest was not raised in the defendant's affidavit in reply. She added that both the Form 16D and the two notices of demand are valid in law and that any alleged discrepancy is not a matter of litigation in proceedings pursuant to s. 256, relying on *Southern Bank Berhad v. Entigma Sdn Bhd* [2002] 8 CLJ 961 HC.

It was also contended for the plaintiff that the defendant is bound by cl. 7(4) of the annexure to the respective charge which is the conclusive evidence clause.

On the issue of non-compliance with O. 83 r. 3(2), the stand taken for the plaintiff is that the authenticity and the registration of the charge were not in issue, neither was the defendant prejudiced in any way, as it was a mere technicality which ought not to be accepted by the court by virtue of O. 1A and O. 2 r. 3, as amended in 2002.

Decision Of The Court

The respective learned counsel's submissions have crystallised the issues for determination by the court *viz*. first, the validity or otherwise of the notices of demand and Form 16D, and secondly the compliance or otherwise by the plaintiff with O. 83 r. 3(2).

1. Notices Of Demand And Form 16D

The aforesaid facts revealed that two notices of demand were served on the defendant as far back as 16 February 2000 and 9 March 2000 for the amounts stated therein and there has been no repayment whatsoever by the defendant at all, neither was any of these notices disputed by the defendant. An exactly identical lackadaisical or lacklustre attitude was shown by the defendant towards the plaintiff's Form 16D dated 21 June 2000 for the amount stated therein.

Enclosure (18) is the affidavit in reply affirmed on 21 May 2002 by one Cheok Lin Hwa, a director of the defendant, who in para 5 thereof alleged that the plaintiff had claimed a rate of interest not pursuant to the rate fixed in the charge, and in para 7 thereof that the notices of demand were not valid because the plaintiff has claimed an excessive amount and an excessive rate of interest.

The said paragraphs were affirmed more than two years after the two notices of demand have been served on the defendant, and referred to a general allegation of excessive rate of interest without condescending to particulars. The short answer to the defendant's general allegations pertaining to the rate of interest is to be found in cl. 7(4) of the respective charge annexure, which, where relevant, merits reproduction as follows:

> ... the Borrower(s) agree that the statement of the Manager, Assistant Manager or any other officer of the Bank as to the amount of such balance shall be final and conclusive against the Borrower(s) ...

In *Siong Holdings Sdn Bhd v. Development & Commercial Bank Bhd* [1997] 1 CLJ 590, it was held by the Court of Appeal that, *inter alia*, following the principle laid down in *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332, the conclusive evidence clause was applicable and therefore there was no need for the chargee to prove the amount owed by the chargor. The court hearing the application for foreclosure does not make, or in any event ought not to make, any adjudication upon any substantive issue. All the chargee had to show in order to obtain an order for sale in foreclosure was the fact of the inability of the chargor to settle the loan. Likewise, the alleged incorrect account of the chargee was also irrelevant to the case.

Quite apart from that, the defendant's said affidavit did not appear to dispute the content of Form 16D nor provide an answer thereto. It is trite law that in the circumstances the content of Form 16D including the amount stated therein must be taken to have been admitted by the defendant: *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529 FC; *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC; *Dawkins v. Prince Edward of Saxe Weimar* [1875-76] 1 QBD 499; *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 CA; *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC; *Alliance Bank Malaysia Bhd v. CKS Trading Sdn Bhd* [2002] 4 CLJ 620 HC).

I am therefore unable to see any substance in the defendant's contention pertaining to the invalidity of the notices of demand and Form 16D.

2. Non-Compliance With O. 83 r. 3(2)

Order 83 r. 3(2) reads as follows:

> The affidavit must exhibit a true copy of the charge and the original charge or, in the case of a registered charge, the charge certificate must be produced at the hearing of the summons.

Since the charges in question are registered charges, O. 83 r. 3(2) requires a charge certificate to be produced at the hearing of the summons. In my view the word "produced" here is satisfied if the plaintiff's affidavit exhibits a charge in Form 16A containing all the particulars of the charge which have been duly entered thereon by the Registrar of Titles who has affixed his signature to the charge and certified it as such. Such certification by the Registrar of Titles would in my view constitute a charge certificate.

Upon a proper perusal of the charge documents in Form 16A herein, it is my specific finding that the particulars of the respective charges have been duly entered, signed and certified by the Registrar of Titles, in which case I hold that the production of a charge certificate under O. 83 r. 3(2) has been satisfied. The defendant was fully aware of the fulfilment of this requirement as the affidavit in reply made no mention of this issue at all.

Another fact that militates against the defendant is that the charge created by the defendant in favour of the plaintiff has never been disputed by the defendant at all.

Further, this issue raised for the defendant is based purely on technical grounds as opposed to the justice of the case and has been superseded by O. 1A, and O. 2 r. 3 which are reproduced as follows:

ORDER 1A

COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE

> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

Preliminary objection for non-compliance of rules not allowed (O. 2 r. 3)

3. A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

There are also high authorities which have consistently rejected submissions on an issue or issues based on technical grounds: see eg, *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645 FC; *Mokhtar bin Amin v. Mohamed Moktar bin Omar* [2001] 4 CLJ 489 CA; *United Malayan Bnking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31 CA; *Beauford Baru Sdn Bhd v. Gopala Krishnan a/l VK Gopalan* [2002] 3 CLJ 686 HC and *Feedmeal Malaysia Sdn Bhd v. Teh Cho Yeow & Ors* [2003] 7 CLJ 11 HC.

3. Authorities Cited For Defendant

The above grounds are indeed sufficient for me to arrive at a decision in this case. However, in deference to the efforts expended by the defendant's learned counsel, I shall now give an analysis of the extent to which the authorities relating to foreclosure proceedings cited by him may be of any assistance to the defendant's case.

In *Multi-Purpose Bank Bhd, supra*, the facts showed, *inter alia*, that the plaintiff has proceeded to base its calculation of interest on a factor that is not permitted by mutual consent of the parties. James Foong J held that it was a cause to the contrary and refused the application for an order for sale.

Where the sum demanded by a chargee plaintiff in the notices of demand had included the element of default interest without serving a notice thereof as required by cl. 5 of the charge annexure, as in *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd, supra*, Lim Beng Choon J held that there was a wrongful demand for payment of default interest and so an order for sale was refused.

In *PhileoAllied Bank (M) Bhd v. Saddhona Indran a/p Sevapragasam, supra,* the chargee plaintiff intended to exercise its right to impose 1% interest from 15 April 1998 but wrongly calculated the interest to run from 9 April 1999. This was held by Kamalanathan Ratnam J to be bad in law and hence the application for an order for sale was refused.

The defendant in *Citibank NA v. Ibrahim bin Othman, supra,* expressly disputed the plaintiffs entitlement to charge an interest of 14% per annum and the plaintiff's affidavit did not show how and from what date the plaintiff has become entitled thereto. Mahadev Shankar J (later JCA) dismissed the application for an order for sale.

Upon a proper perusal of the aforesaid authorities, I am of the view that the undisputed facts before me, as affirmed in the affidavits filed herein, do not seem to show any similarity or resemblance with the facts in the authorities cited for the defendant. In the circumstances, I am unable to hold that the defendant could derive any assistance or garner any support therefrom.

4. "Cause To The Contrary"

It is trite law that on an application for an order for sale in a charge action as in encl. (2) herein, the court must make an order for sale to which the charge relates unless it is satisfied of the existence of cause to the contrary: s.256(3) as applied by the Privy Council in *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1.

In *Low Lee Lion v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 the Federal Court held that 'cause to the contrary" within s. 256(3) might be established in only three categories of cases:

(i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340;

(ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and

(iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

The defendant has relied on category (ii) above but failed to establish that category. The plaintiff has in my view succeeded in meeting the conditions precedent for the making of an application for an order for sale.

5. Conclusion

For reasons stated above, I am unable to uphold the contention for the defendant. I therefore make an order for sale in terms of the plaintiff's application in encl. (2) in the sum of RM878,433.15 as at 22 September 2003. Auction date is fixed for 8 December 2003.